No. 15,145

United States Court of Appeals

For the Ninth Circuit

A. W. HARTWIG and JEFF TINGLE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief for Appellants

STERLING M. WOOD
Billings, Montana
Attorney for Appellants

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STATEMENT OF THE PLEADINGS AND JURISDICTIONAL FACTS

The action here involved was instituted in the United States District Court for the District of Montana, Billings Division, by United States of America, as plaintiff, against the appellants, A. W. Hartwig and Jeff Tingle, and also one W. C. Jennings, as defendants, the latter of whom has died.

The amended complaint (Tr. 2, et seq.) and the attitude of government counsel throughout this case, establish that the United States of America contends that jurisdiction, primarily, of this action is conferred by the Veterans Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. App., Sec. 1821, et seq.), and by Priorities

Regulation No. 33 promulgated by the Civilian Production Administration, which contentions are denied in the answer of the Appellants (Tr. 40 et seq.). The said answer also denies the allegation of the amended complaint that Priorities Regulation No. 33 has been in effect at all times material to this action, and, generally, the answer puts the government to its proof. This action was brought October 8, 1948 (Tr. 1).

This action purports to be one in equity for a mandatory injunction, *first,* directing the Appellants here to complete the construction of the dwellings involved or that the value of the non-conformity be awarded to the purchasers, and *second,* directing the Appellants to restore to the purchasers named certain claimed overcharges received by the said Appellants in the sale of dwellings at prices in excess of approved maximum prices, and *third,* directing the Appellants to make restitution to each of the said purchasers by paying and satisfying certain special improvement levies or taxes imposed by county authorities against dwellings purchased, or, in the alternative, by paying the amounts of such taxes to the said purchasers.

The issues of fact herein were referred to a Special Master appointed by the lower court (Tr. 155) who made his report to the Court (Tr. 156 et seq.) with findings therein for the government. To this report the Appellants duly filed written objections (Tr. 161 et seq.) and then moved the lower Court (Tr. 203 et seq.) to act on the report of the Master and upon the objections thereto

and to reject the report in its entirety. The Court, however, accepted and approved the report of the Special Master (Tr. 206) and then rendered judgment for the government accordingly (Tr. 223), which was entered February 24, 1956, from which judgment the Appellants have appealed to this Court, (Tr. 227 et seq.).

The jurisdiction of this Court is based on U. S. Codes, Title 28, Section 1291, which provides that the Courts of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States.

STATEMENT OF THE CASE

The Appellee, the United States of America, plaintiff in the lower Court, declared in its amended complaint (Tr. 2 et seq.) upon two counts. The appeal is from the judgment rendered in favor of the government on both counts.

In the first count it is alleged that the Appellants here, defendants below, applied for and received authorization for priorities assistance from the government to construct a number of dwellings in Montana and that the maximum sales price finally established was $8,000.00 for each dwelling for which the priorities assistance was granted. Then it is alleged that the Appellants represented, by plans and specifications and otherwise, that the said maximum sales price included all special assessments and that such established maximum sales price was required by Priorities Regulation No. 33 to include all such improvements as water mains, sewers, etc. It is fin-

ally alleged in this count that, after the issuance of authorization and priorities assistance and during the time Priorities Regulation No. 33 remained in effect, the said Appellants sold 25 authorized dwellings and violated the Acts involved and the said Regulation by selling some of the dwellings at prices in excess of the maximum sales prices approved by the Federal Housing Administration, and by failing to construct the dwellings in accordance with the said plans and specifications, and the government then lists claimed excessive sale prices and defects and omissions in an attached schedule, as a result of which it is alleged finally in this count that the Appellants were enriched and the purchasers of the dwellings constructed have been deprived of things of value to which they were entitled.

In the second count most of the allegations of the first count, as above, are repeated, and it is alleged, further, that the Appellants violated the law and the regulations by selling the dwellings involved without taking care of special improvement taxes assessed against the properties involved.

The answer of the Appellants to the amended complaint puts in issue the essential allegations of that amended complaint. Furthermore, the Appellants pleaded defensively in their said answer that in good faith they constructed and completed the housing accommodations, to which the second count of the amended complaint refers, in substantial compliance with the specifications, descriptions of material and plans involved and approved, and

that, then, the plaintiff, the Appellee here, acting through the Federal Housing Administration, inspected and accepted the dwellings so completed as in full conformity with the specifications, descriptions and plans, and as full performance by and on the part of the defendants, the Appellants here, of their contract with the government, or otherwise, for the construction and completion of the housing accommodations and as full satisfaction and in full discharge of all and every the obligations of the said Appellants, or either of them, under any such contract.

The question involved upon this appeal is primarily whether the lower Court erred in the rendition of its judgment of February 24, 1956, based upon its adoption of the report and findings of the Special Master and the making by the Court of an order in that connection.

SPECIFICATION OF ERRORS

Specification of Error No. 1.

The lower Court erred in rendering the judgment (Tr. 223 et seq.) herein.

Specification of Error No. 2.

The lower Court erred in the making of its order (Tr. 206 et seq.) and in not sustaining the objections of the Appellants to the report of the Special Master. (Tr. 161 et seq.)

ARGUMENT

I.

THE AMENDED COMPLAINT HEREIN DOES NOT STATE A CAUSE OF ACTION IN EITHER OF THE COUNTS PLEADED.

To epitomize, before the submission of argument and authority in support of the above captioned contention of the Appellants herein:-

The Appellee, the United States of America, has taken the position herein that a basis for this action is found in the Act of Congress, known as the Veterans Emergency Housing Act of 1946, and in Priorities Regulation No. 33 issued by the Civilian Production Administration; but Appellants contend that the repeal by Congress, by the Housing and Rent Act of 1947, (before the action at bar was brought) of the said 1946 Act, operated also to repeal the said Regulation, and deprived the Appellee of the right to bring this action. Furthermore, Appellants contend that the United States of America, by reason of the complete change of policy effected by the said 1947 Act of Congress, had no right, in any event, to bring this action in equity. Argument now follows in support of the foregoing contentions.

Upon June 30, 1947, the Veterans Emergency Housing Act of 1946, upon which, under the amended complaint herein, this action is based in part, was repealed by the Housing and Rent Act of 1947. The repeal clause of the 1947 act repeals expressly the various sections of the 1946 Act involved, and concludes with the following proviso, viz:-

> "Provided, that any allocation made or committed, or priorities granted for the delivery, of any housing materials or facilities under any regulation or order issued under the authority contained in said act, and before the date of the enactment of this act, with respect to veterans of World War II, their families, and others, shall remain in full force and effect."

It is apparent, as a matter of common sense, and apart from decided cases or argument, that the 1946 Act was wiped out, as it were, by the said Act of Congress, *except only* as to the allocations, etc., designated in the above quoted proviso of the 1947 Act, which do not include the claims made the basis of the action at bar. The only authority of law for the promulgation of Priorities Regulation No. 33 (upon which Regulation the United States of America, the Appellee herein, predicates some of its pleaded claim to relief in this action) will be found in the said 1946 Act—the Veterans Emergency Housing Act. When that 1946 Act was repealed, by the Housing and Rent Act of 1947, such repeal operated also to repeal the said Regulation, as we read the decision of the Supreme Court of the United States in U.S. v. Fortier et al., 342 U.S. 160, 96 L.Ed. 179.

The said Priorities Regulation No. 33 is not a statute, in any sense of the word and, consequently, its repeal, when statutory authority for the Regulation was repealed by the said 1947 Act, destroyed the Regulation in its entirety and left it without legal effect when the action at bar was brought in 1948. In Hollingsworth et al. vs. Federal Mining & Smelting Co. (United States, Intervener) 74 Fed. Sup. 1009, par. 4 of the syllabus provides:-

"Where an Act of Congress concerns the welfare of the public at large as well as of a particular class (the condition which exists in the case at bar) persons acting under such act are deemed to have acted in contemplation of power of Congress to modify or repeal and that any such modification or repeal will limit or take away rights of recovery unless it is provided in act itself that rights are not to be affected."

As to the effect of the repeal of the 1946 Act by the Housing and Rent Act of 1947, we cite the case of Wilmington Truck Co. vs. United States 28 F(2d) 205 and 208, where the court applies a federal statute (upon which the Appellee relies herein) and also a decision by the Supreme Court of the United States. The following is quoted from the Wilmington Truck Co. case, to-wit:-

"Section 13 of the Revised Statutes is also relied upon to show that the liability for the tax was not destroyed by the repeal of the statute. This section provides:

" 'The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.' ***** 1 U.S.C.A. sec. 29. Of this statute the court, in Great Northern Railroad vs. United States, 208 U.S. 452, 28 S.Ct. 313, 52 L.Ed. 567, said: As it 'has only the force of a statute, its provision cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.' As the estate tax provisions of the Revenue Act of 1918 were expressly repealed, *with specified exceptions, it must be assumed that the exceptions specified constituted a denial of others.* To enlarge the exceptions by adding the provisions of section 13 of the Revised Statutes thereto,

or, more accurately stated, to add to the saving clause of the repealing statute the provisions of R. S. Sec. 13, which, as I understand it, is in implied, if not direct, conflict with the first sentence of the saving clause of the repealing act, would, I think, be plain disregard of the will of Congress as manifested in the repealing act. Fletcher v. Peck, 6 Cranch, 125, 3 L. Ed. 162."

Consequently, on and after June 30, 1947, the Veterans Emergency Housing Act of 1946, upon which the Government relies in this case, ceased to exist, except only to the extent of the proviso in the repeal act above mentioned; and that proviso does not keep effective, either directly or indirectly, any such right of action as the United States of America claims here.

Attention is also called to the case of Sedivy vs. Superior Home Builders, decided by the Court of Appeals for the Seventh Circuit, and reported in 188 F. (2d) 729. While in the Sedivy case the point here involved and presented was not considered specifically, it was indirectly. The court has made clear its thinking, as we view it, which is that the Veterans Emergency Housing Act of 1946 was so repealed, by the 1947 Act, as to leave no right, for the recovery of damages or overcharges, vested in anyone. The following is quoted from the decision in the Sedivy case:

"We assume that 'by this act' plaintiffs refer to the act of 1947, which became effective June 30, 1947, and by its terms repealed the 1946 Act as of that date. *Admittedly, the 1947 Act contained no maximum price at which housing accommodations could be sold, and, therefore, no right on behalf of a purchaser to sue for an overcharge.* As we understand, plaintiffs

do not contend otherwise but assert that the right created by the 1946 Act survived without any limitation period during which suit must be brought. In this connection it is also argued that Priorities Regulation No. 33 remained in full force and effect until December 31, 1947.

"We think the contention must be rejected. The act of 1947, Title 50 U.S.C.A. Appendix, Sec. 1881, et seq., provides: 'Sections 1, 2(b) through 9, and Sections 11 and 12 of Public Law 388, Seventy-ninth Congress (Sections 1821, 1822(b-d), 1823-1829, 1831 and 1832 of this Appendix), are hereby repealed ****.' Obviously, this repeal language includes section 7(d) (heretofore quoted) of the 1946 Act. However, plaintiffs rely upon a proviso which follows the repealing provision and which states: 'That any allocations made or committed, or priorities granted for the delivery of any housing materials or facilities under any regulation or order issued under the authority contained in said Act, and before the date of enactment of this Act (June 30, 1947), **** shall remain in full force and effect.' *It plainly appears that this proviso relates solely to allocations and priorities made and granted while the 1946 Act was in effect, and that it was not directed at or intended to retain in force the maximum selling price contained in the repealed Act. That provision, as shown, was expressly repealed. It is true, as plaintiffs state, that the 1947 Act contains no limitation period, but that fact militates against plaintiffs' contention. Certainly there was no occasion to fix a limitation period on the exercise of a right which had been repealed.* Plaintiff's contention leads to the incongruous result that if the 1946 Act were still in effect, the limitation period which it contained would constitute a barrier to the instant suits but that such suits may be maintained under the 1947 Act because the latter contains no limitation period. *Evidently Congress by the 1947 Act intended to restrict rather than expand the right conferred by the 1946 Act.*"

Thus, the repeal of the 1946 Act by the 1947 Act, with the proviso therein above quoted, left the 1946 Act unaffected by the provisions of the statute referred to as 1 U.S.C. 109, and relied upon now by the United States of America, the Appellee herein.

Supplementing the foregoing authorities, attention is called to Lewis Sutherland on Statutory Construction, 2nd Ed., Vol. 2, Par. 494, on Page 923, where the author says:-

> "An express exception, exemption or saving excludes others. Where a general rule has been established by statute with exceptions the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law and enumeration weakens it as to things not expressed."

In the case of Addison et al. vs. Holly Hill Fruit Products, 322 U.S. 607, 88 L. Ed. 1488, the court rules that: "Exemptions from the operation of a statute made in detail preclude their enlargement by implication."

The attention of the court is also directed to the provisions of 59 C. J., Statutes, Par. 644, page 1093, where the author says:-

> "A saving clause is an exception of special things out of the general things mentioned in the statute; something smaller than the thing itself and yet not nullifying it. Its usual function is not to create anything, but to preserve something from immediate interference, and its most common use is in repealing statutes for the purpose of saving from their operations rights accrued, duties imposed, penalties, or other liabilities incurred, and proceedings commenced. A saving clause in a saving or construction section should not be confused with a saving clause in a repealing section; in the former enumeration is made to save the

enumerated things, not to destroy the things not enumerated, but *where there is an express repealing section* (and that is the situation in the case at bar) *the saving clause saves only what it embraces, and all things not enumerated are destroyed,* not because they are not included in the saving clause, but by virtue of the destructive force of the repealing portion of the Act. *A saving clause must ordinarily be strictly construed, so as not to include anything not fairly within its terms."*

See, also, to the same effect as above, 50 Am. Jur., Statutes, Par. 434, and 82 C.J.S., Statutes, Par. 383, page 895. A case cited in connection with the rule there expressed is that of Walsh vs. Alaska S. S. Co., (Wn.) 172 Pac. 269, where the court, by adopting the language of an argument of counsel in the case, announces the following rule:

"Where there is an express repealing section, all things not enumerated in the saving clause are destroyed by the express provisions of the repealing portion of the section *****. The saving clause saves only what it embraces and all not embraced are destroyed."

In Shilkret vs. Musicraft Records, Inc., 131 Fed. (2) 929, the court says:

"It is an established rule of statutory construction that a proviso (such as we have here in the repeal clause of the 1947 law directed at the 1946 Act) states an exception from the general policy which the law embodies, and should be strictly construed and so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment."

These settled rules of construction may not be ignored in passing upon the effect of the 1947 Act herein involved. Under the various authorities cited, supra, the 1947 Act left the United States of America, in the case at bar, with

no right of action whatever against the Appellants. In other words, 1 U.S.C. 109 has no application in the case at bar because the repealing act, of 1947, is effective to extinguish any "liability incurred" under the 1946 Act, in that the 1947 Act does "so expressly provide."

It should be stressed that this action was brought upon October 12, 1948, and that it was brought by the United States of America, as plaintiff, and not by any property owner or by the Housing Expeditor. Next it should be noted that the Housing and Rent Act of 1946 protected any allocation made or committed or priorities granted for building materials of Veterans of World War II or their families under the Veterans Emergency Housing Act. In other words, this protection was continued in effect in the Housing and Rent Act of 1947, to honor any such commitments as aforesaid as might still exist. Then, having repealed the Veterans Emergency Housing Act of 1946 by the Housing and Rent Act of 1947, Congress addressed itself specifically to the problem of Veterans' Housing, in the said Housing and Rent Act of 1947. Thus, it is provided that no single family dwelling, the construction of which is completed after the date of the enactment of the Act and prior to March 1, 1948, shall be sold or offered for sale prior to the expiration of thirty days after construction is completed for occupancy by persons other than Veterans of World War II or their families. It is further provided in the 1947 law last mentioned that no such dwelling house shall be sold or offered for sale to any person at a price less than the price

for which it is offered to veterans or their families. If Congress had intended to keep in force any maximum selling prices, which had theretofore been imposed under Priorities Regulation No. 33, it would have been natural to express such intent (which was not done) in the proviso to paragraph 1(a) of the Housing and Rent Act of 1947, which repealed the Veterans Emergency Housing Act and Rent Act of 1947, (the statutory basis for Priorities Regulation No. 33). The repeal of the Veterans Emergency Housing Act of 1946 by the 1947 law mentioned covered practically all of the sections of the Veterans Emergency Housing Act of 1946 and did so *specifically.*

The Housing and Rent Act of June 30, 1947 *completely changed the policy of Congress* as expressed previously in the Veterans Emergency Housing Act of 1946.

This court, in the case of Woods vs. Richman et al., reported in 174 F.(2d) 614, has the following to say, which is most pertinent here, to-wit:

> "Had the Congressional policy in respect to rent control lapsed with the expiration on June 30, 1947, of the Emergency Price Control Act, we would assume that an order designed primarily to vindicate the defunct policy would no longer be appropriate in equity."

In other words, when the policy of the Veterans Emergency Housing Act was changed by the adoption by Congress of the June 30, 1947, law, it then became no longer possible, under the law, for the Government of the United States to proceed in equity, as attempted in the

case at bar, to enforce the defunct policy of the Veterans Emergency Housing Act of 1946; and there is nothing in the 1946 Act itself, that gives any right to the Government to so proceed. This is another way of saying that the amended complaint herein does not state a cause of action in either of the counts involved.

It is pertinent to refer to a case decided January 8, 1954, by the Supreme Court of the United States, being United States of America vs. Harold T. Lindsay, et al., 346 U.S. 568, 98 L.Ed. 300. In that case the court had occasion to rule as follows:-

> "Congress has unquestioned power to bar recovery on claims of the federal government if it sees fit."

Another decision of consequence in this connection is that of United States of America vs. Fortier, et al., 342 U.S. 160, 96 L.Ed. 179, where the court has the following to say about the law here involved:-

> "The 1946 Act contained detailed authorization for price restrictions on houses and for priorities on building materials. When that Act was repealed in 1947, Congress provided for veterans' preferences in the sale and rental of housing and for rent ceilings on certain accommodations constructed with the assistance of priorities secured under the 1946 Act. Congress addressed itself to the problem of veterans' housing, but refrained from imposing any price restrictions on the sale of houses."

In other words, the Supreme Court of the United States points out the change in policy brought about by the repeal of the Veterans Emergency Housing Act of 1946 by the 1947 law.

When coming into a court of equity, as the United

States of America has done in the case at bar, it must show an equity in its favor. (See United States vs. Fletcher Savings and Trust Company (Ind.) 151 N.E., 420.) But there is no equity in the government's stand in the suit at bar, based, as the suit is, on a policy of Congress that had been completely changed, and the government's right in the premises repealed, and long before this so-called equitable action was brought.

To summarize, briefly, under this subdivision of the argument herein, the amended complaint in this action does not state a cause of action, in either of its counts, against the Appellants, because of the repeal, by the 1947 Act, of the 1946 Act, and of Priorities Regulation No. 33, upon which the action at bar is based, such repeal in the 1947 Act being made with a reservation of some rights but not with the reservation of the right to prosecute this action which the government has brought. Then, too, the policy of Congress has been completely changed as a result of the aforesaid repeal of the 1946 Act, and this policy was changed upon June 30, 1947, long before this action was brought in the fall of 1948. This repeal in 1947 of the 1946 statute and of the said Regulation, and of the policy of Congress under the 1946 statute, left the government without any right to bring this so-called equitable action in the fall of 1948, predicated, as it is, upon the theory a then existing policy of Congress was being enforced.

The fact may not be overlooked that, under the argument and authorities supra, it is clear that not only was the

Veterans Emergency Housing Act of 1946 repealed in June, 1947, but that there was necessarily repealed at the same time Priorities Regulation No. 33 which had its basis solely and only in the Veterans Emergency Housing Act of 1946. The amended complaint herein is based specifically upon the Veterans Emergency Housing Act of 1946 *and* upon Priorities Regulation No. 33, and this has been done in face of the fact that the said Act and the Regulation had no legal existence when the suit was brought.

There is no basis, in law, or in equity, for the institution of the action at bar, and the amended complaint herein does not state a cause of action in either of the counts pleaded. The Appellants are not liable to the government in this suit for any of the claims the government asserts. There is no foundation, in fact or in law, for the report of the Special Master, that has been excepted to by the Appellants, or for the judgment, which the lower court entered, based upon the illegal and unwarranted findings of the Master herein. That judgment, under the law, should be reversed and set aside.

II.

THE APPELLANTS ARE NOT LIABLE IN ANY EVENT FOR THE SPECIAL ASSESSMENTS.

In the first place, under this subdivision of the argument herein, it is important to consider Priorities Regulation No. 33. That regulation, at the outset thereof, reads as follows, to-wit:

"This regulation sets up the Reconversion Housing Program of the Civilian Production Administration. It is designed to assist private builders, educational institutions and others to build moderate cost housing accommodations to which veterans of World War II will be given preference, by giving an HH preference rating for certain building materials for the construction. The regulation describes the method of applying for the HH rating, the circumstances under which the rating will be assigned, the materials for which it will be given and the condition imposed on the builder and succeeding owners in selling or renting the accommodations as long as this regulation is in force."

It is particularly worthy of note, in support of this argument that the regulation specifically refers to housing *accommodations.* Furthermore, the whole purport of the Regulation, without going into further details, is that builders, under that Regulation, can get materials for the construction of *accommodations.* In other words, the builder is to build and is to get the material for those building operations. Not a word can be found in this Regulation regarding matters that are handled, in every state of the union, by city and county authorities only, such as the paving of streets, etc., resulting in special assessments that become liens on real estate.

Thus, under settled rules of statutory construction, the following language of Priorities Regulation No. 33, upon which the government is standing in the case at bar to establish liability of the Appellants for special assessments levied, does not mean, and cannot be distorted to mean what the government contends, to-wit:

"A builder must not sell a one-family dwelling built

> or converted under the Reconversion Housing Program, including the land and *all improvements* (including garage if provided), for more than the maximum sales price specified in the application," etc.

Neither directly nor by implication does the plain language of this quoted clause obligate a builder, upon making a sale, to take care of special assessments levied by public authorities against the land involved.

It is pertinent to here note the case of Bemis vs. First National Bank, (Ark.) 40 S.W. 127, where the court considers the phrase, "and all the improvements thereon," and rules that it is:-

> "A phrase of such common use in our Western country to denote what ever has the character of a physical fixture."

And a "fixture" is defined by Sec. 67-209, Revised Codes of Montana, 1947, as follows:-

> "67-209. (6669) Fixtures. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of building; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws."

In Lewis' Sutherland Statutory Construction, 2nd Ed., Par. 390, the Author says:

> "As a general rule the words of a statute are to be taken in their ordinary and popular sense, unless it plainly appears from the context or otherwise that they were used in a different sense."

Furthermore, in the same work on Statutory Construction, Par. 422, the Author says:

> "When there are general words following particular

and specific words, the former must be confined to things of the same kind. This is known as the rule or doctrine of ejusdem generis. Some judicial statements of this doctrine are here given. 'When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated.' 'The rule is, that where words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things or cases of like kind to those designated by the particular words.' 'It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes but to those affecting only civil rights and duties, that where words particularly designating specific acts or things are followed by and associated with words of general import, comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used, not in the broad sense which they might bear if standing alone, but as related to the words of more definite and particular meaning with which they are associated."

To all intents and purposes the Priorities Regulation here involved has been treated as a statute or a contract and must be so treated for the purposes of construction of its language.

Thus, standing upon the foregoing authorities alone, the word "improvements" in the Priorities Regulation above quoted has reference to things built by the builder (like houses and garages) and nothing else, which is another way of saying that by the word "improvements" in the said Regulation is meant and intended structures built

with material for which the builder gets a rating.

But it also is a settled rule of construction, as set forth in Lewis Sutherland on Statutory Construction, 2nd Ed., Par. 368, as follows, to-wit:

> "The practical inquiry is usually what a particular provision, clause or word means. To answer it one must proceed as he would with any other composition —construe it with reference to the leading idea or purpose of the whole instrument. A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently each part or section should be construed in connection with every other part or section and so as to produce a harmonious whole. It is not proper to confine the attention to the one section to be construed. 'It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, into separate words, and then apply to each, thus separated from its context, some particular definition given by lexicographers, and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascertained from the context, the nature of the subject treated of and the purpose or intention of the parties who executed the contract, or of the body which enacted or framed the statute or constitution."

Priorities Regulation No. 33 relates exclusively to building activities of accommodations for veterans, to be constructed by contractors and builders who have a priority for materials for such construction work. Thus, *construing the Regulation as a whole,* as must be done under the law, the word "improvements," here involved, necessarily means improvements that are constructed with material for which a builder is given a rating, and it can-

not be construed otherwise without doing violence to the Regulation and to the rules of construction, supra. This is simply another way of saying that there is no basis whatever in the law for arguing or contending that there is anything in Priorities Regulation No. 33, as applied to the case at bar, that obligates the Appellants, as contractors and builders, to take care of the special assessments that have been levied against the properties involved herein.

It cannot be argued legitimately that the mere verbal promises of the Appellants here, or one of them, to take care of the special assessments on the properties involved created any legal obligation in this connection that the government or anybody else can enforce. At best, the evidence in this connection in the record is of pure conversation on the subject, and nothing more. But the facts must be reckoned with that the truth of the statements of the witnesses for the government in this connection is repudiated by the witness Hartwig, as the record herein discloses. Furthermore, the testimony of the various persons for the government is completely repudiated by what they did later. In every instance, when the lands involved were sold by Messrs. Hartwig and Tingle, they were conveyed through dealings between the Security Trust and Savings Bank, of Billings, Montana, and the purchasers. The purchasers accepted straight warranty deeds, (the consideration therefor being the maximum sale price, in each sale, of $8,000) from Messrs. Hartwig and Tingle, and their wives, which deeds bore dates as

of a time prior to the date in the fall of 1947 when the liens for the special assessments involved became such upon the lots in Calhoun Lane Subdivision. Thus, the warranty deeds given to the purchasers, as grantees, have the legal effect of making the said grantees liable (not the grantors) for assessments that attached, as liens, to the lots subsequent to the dates of the warranty deeds; and all of the special assessment liens did so attach subsequent to the execution and delivery of the deeds, and in the fall of 1947.

Therefore, there is nothing whatsoever in the record herein, or in the law, that gives the government, as Appellee, herein, or the property owners in Calhoun Lane Subdivision, any right whatsoever to collect from the defendants the special assessments levied upon the lands in Calhoun Lane Subdivision. The Priorities Regulation is wholly without force or effect in this connection; and there is nothing else in the record or the law upon which the government can stand to establish the claimed liability of the defendants in this connection.

III.

THERE ARE NO "DEFECTS OR OMISSIONS," AND THE FHA HAS SO CERTIFIED.

The contention under this subdivision of the argument is established on the record herein by the Compliance Inspection Report of the FHA in which it is certified by FHA officials as follows: "Building improvements acceptably completed." That inspection re-

port is signed by Mr. H. A. Viken, Construction Examiner, and is dated October 23, 1947. It further bears the certificate of L. O. Bradford of the FHA, and its acting chief architect, and the certificate of S. L. Berg, Chief Underwriter of the FHA, the latter certifying that there has been compliance, and firm commitment, and that closing papers may be submitted. To be specific, the Compliance Inspection Report referred to is Exhibit No. 20 ("Book of Exhibits" herein, page 378).

Apart from the Compliance Inspection Report mentioned, attention is also invited to Para. (e), of Priorities Regulation No. 33, which reads as follows, to-wit:

> "Construction of the Project. A builder who uses the HH rating to get materials for housing accommodations must construct them in accordance with the description given in the application *except where he has obtained from the Federal Housing Administration approval for a change from the application.*"

Thus, apart from the finality of the Compliance Inspection Report, above mentioned, that Report also operates by its express language, as approval by the FHA of any changes from the description given in the application.

Incidentally, the testimony of Mr. Tingle is noteworthy in this connection. Without referring to it specifically herein, by many transcript references, Mr. Tingle, who is experienced in construction work, said, in substance, that the so-called "defects and omissions," that have been referred to, are really substitutions that were necessary and that were made in the progress of the

work with the knowledge and approval of the FHA and its inspectors. He said specifically that he did not omit anything in the construction of the houses without the consent and approval of the FHA inspectors, and that there were no defects, as such, in the work. Then, too, he explains why it became necessary to make some substitutions and changes in the original plans and specifications. The explanation is that, in substance, the year 1946 was one of the most difficult times for construction, that materials of all descriptions were exceedingly difficult to get hold of, especially for twenty-seven houses at one time rather than just merely one, and that not only were materials difficult to obtain, but prices were constantly going up. He says, too, that even though Messrs. Hartwig and Tingle had a priority right to secure materials for the houses, it wasn't the highest priority right and that there were two or three higher ratings that were in existence at the time, and the ratings Messrs. Hartwig and Tingle had only entitled them to purchase the material involved that could be located, to say nothing of finding a seller who would sell the material at the priority rating that Messrs. Hartwig and Tingle had. In conclusion, Mr. Tingle says it was because of these conditions that certain changes were made, and only changes that were made necessary by these conditions. Again Mr. Tingle says that, in the progress of the work, while these changes were being made, which the government refers to as "defects and omissions," the changes were approved by all of the inspectors and were ultimately approved in

the final Compliance Inspection Report. Mr. Tingle expressly repudiates that there were either construction defects or omissions in the work which Messrs. Hartwig and Tingle completed under the FHA arrangement and approval.

Apart from the argument, supra, in this subdivision hereof, in the case of Re. opinion of the Justices—a decision of the New Hampshire Supreme Court, reported in 179 Atl. 344, the court says:

> "A valid administrative judgment has the same force of obligation and finality as a judicial one."

As the court points out in that case, a ruling of this sort is required to produce "an efficient and effective administrative enforcement of the public interest."

Attention is also called to the controlling case of United States vs. Kaufman, 24 L. Ed. 792, where a ruling was made by a Commissioner of Internal Revenue, and the Supreme Court of the United States had the following to say:

> "It is now insisted that the finding of an allowance by the commissioner is not enough, and that the court should have gone behind the allowance and found the facts in respect to the original claim. Such, we think, is not the law. To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the Government, by an ordinary accounting officer, but the adjudication by the first tribunal to which the matter must by law be submitted. Until so submitted, and until so adjudicated, there is not even a prima facie liability of the Government; but when submitted and when al-

lowed upon the adjudication, the liability is complete until in some appropriate form it is impeached. When, therefore, the court found the adjudication against the Government, without impeachment, the liability to pay was established. We do not decide that in the Court of Claims the adjudication of the commissioner may not be impeached, but we do decide that, until impeached, it is binding, and that the affirmative of the impeachment is upon the Government."

Here, therefore, the government is bound by the rulings made by the FHA officials in the aforesaid Compliance Inspection Report (Exhibit 20). In other words, Exhibit 20 is the precise equivalent of a judgment in an ordinary action at law. Until that judgment is set aside and impeached, by proceedings proper in the premises (which has not been done herein), it must stand and be and remain final and conclusive. Upon the last mentioned grounds alone, therefore, without reference to the other points presented herein, the defendants are not liable for the so-called "defects and omissions."

And the fact may not be overlooked or disregarded, under the record herein, that, acting upon the strength of the Compliance Inspection Report above-mentioned, and in October, 1947, the Security Trust & Savings Bank, through which all transactions with the property owners in Calhoun Lane Subdivision were carried on, then released, on the strength of the Compliance Inspection Report, the moneys borrowed by the property owners, as mortgagors, from the Bank. Certainly under these conditions there is no equity in the claim which the govern-

ment now makes in this action; and yet this is a suit in equity in which the government pretends to stand upon equitable claims in a court of equity.

For all of the reasons advanced under this subdivision of the argument, it is clear that not only were there no "defects or omissions." so-called, in the work of the Appellees herein, but that, in any event, the government is not entitled to recover anything in connection with the claims it makes in this connection.

IV.

CONCLUSION

We feel that it will be helpful to the court if we here epitomize the objections the Appellants made to the Master's report, and that epitome is as follows, to-wit:

The Master erred in his report:-

1. In disregarding (a) the facts established of record, and (b) the applicable principles of law;
2. In failing to make the findings of fact requested by the Appellants;
3. In the making of his findings of fact and conclusions in that the said findings of fact and conclusions are contrary to the evidence in the record and are not in accordance therewith and, furthermore, do violence to and disregard the applicable and established principles of law presented in argument;
4. In disregarding the objection made by Appellants' counsel at the outset of the hearing before the Master to the introduction of any evidence upon the ground that the amended complaint fails to state a claim

against the Appellants, either jointly or severally, in either or both of the counts involved, upon which relief can be granted;

5. In paragraph 3 of his findings of fact and in the following statement made by the Master therein, to-wit: "This finding of fact is compelled by exhibit 15, in the face of which subsequent conflict in the testimony and argument by learned counsel for the defense must fail. The representations by the defendants that street and utilities improvements would be installed by them and included in the sale price and that the purchasers would not be required to pay any special assessments, as made in said exhibit 15, are clear and unambiguous and were not altered by other exhibits or testimony." The Master erred in this connection in that said exhibit 15, as the Court will see from examining the exhibit, was made and submitted, as set forth specifically therein, upon *May 18th, 1946,* which was prior to the enactment into law, upon *May 22nd, 1946,* of the Veterans' Emergency Housing Act of 1946, upon which Act this action is predicated, and, accordingly, exhibit 15 was not made pursuant to or in furtherance of the said Act and is without legal effect in this action; and, in further support of the objections in this particular paragraph hereof set forth, attention is called to the objection made by the Appellants to offered exhibit No. 15, which objection was overruled, and this objection is predicated upon the ground that the exhibit was and is irrelevant for any purpose;

6. In paragraph 3 of his findings of fact in disregarding:-

(a) The plain language of the Veterans' Emergency Housing Act of 1946, which statute, in Section (3) thereof, defines "improvements" for the purpose of the law as "Improvements sold with the housing accommodations"; and (b) the fact of record that the Appellants have sold no improvements in their sales of housing accommodations; and (c) the fact that there is no evidence in the record that the Appellants have made any express or other representations that the maximum sale price established included or would include any special improvements of any kind;

7. In stating, as a finding, that it is his opinion that the approval of variations in construction by representatives of the Federal Housing Administration was not within the scope of their authority, and the Master so erred in that under paragraph 5 (e) of Priorities Regulation No. 33, it is provided that a builder who uses the rating therein provided for to get materials for housing accommodations must construct them in accordance with the description given in the application *except* where he has obtained from the Federal Housing Administration approval for change from the application; and in further support of this objection to the Master's report the record before the Master establishes, without contradiction, that any variations in construction work involved were neither defects nor omissions but were changes in construction that were approved, pursuant to law, by the

FHA, by the various Compliance Reports involved and placed in evidence.

To some extent these requested findings of fact include concise argument on some of the applicable law, as the Court will see from the foregoing language, which argument will not be further extended in this brief.

The Appellants submit that the objections they made to the Master's report, as above epitomized, were properly taken and should have been sustained.

As an argument that is directed at all of the contentions of the government in this case, as to special assessments, so-called defects and omissions, and otherwise, the extinguishment in June, 1947, of Priorities Regulation No. 33, left the government without any basis for this lawsuit. Even if it were conceded (and this would be done only for the purposes of this argument and not otherwise) that, by virtue of the Act of Congress, mentioned throughout this brief as 1 U.S.C. 109, the 1947 Act did not have the effect to release or extinguish any liability incurred under the 1946 Act, it must be borne in mind nevertheless, that the government stands primarily upon Priorities Regulation No. 33 as a basis for its claim to recover the special assessments involved, and the so-called defects and omissions. The government claims that liability of the Appellants for these items has been created by Priorities Regulation No. 33. The 1946 Act, as a matter of fact, contains no provisions such as are found in Priorities Regulation No. 33 with respect to the carrying on of construction work, plans and specifi-

cations in that connection, how they can be altered or modified, and what obligations the contractors shall be expected and required to assume and take care of. Thus, with Priorities Regulation No. 33 extinguished in June, 1947, there is no basis for proceeding in this suit (brought in 1948) since all of the claims of the government are based primarily upon the said Priorities Regulation No. 33 and the claimed requirements thereof. The said statute, 1 U.S.C. 109, relates solely to *statutes,* and has no application, by its terms, or otherwise, to *regulations* of the FHA or of any other federal body. In other words, the statute, 1 U.S.C. 109, does not purport, directly or indirectly, to keep in force any regulation whatsoever that is affected and extinguished by the repeal, as here, of a statute.

In final conclusion herein it is urged, upon both reason and authority, that there is no basis, in law or in fact, for the judgment rendered in the lower court and that it should be reversed, with directions to dismiss this action.

Respectfully submitted,

STERLING M. WOOD

Attorney for Appellants